Crim.A. 77/64

HIRSCH BERENBLAT

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal
[May 22, 1964]
Before Olshan P., Landau J. and Cohn J.

Evidence - admission of testimony of single witness - matters to be taken into account - Nazi and Nazi Collaborators (Punishment) Law, 1950, sec. 5.

The appellant was convicted on five counts under the Nazi and Nazi Collaborators (Punishment) Law. 1950. On two of these counts he was convicted on the strength of the evidence of a single witness, found to be credible by the lower court. He appealed against conviction.

Held, granting the appeal, that in criminal matters, a court can convict on the evidence of a single witness without corroboration, after duly "cautioning" itself as to its credibility *per se* and considering its weight and relevance in the whole complex of evidence tendered by the prosecution with regard to the circumstances of the case and the defendant's participation therein. The best evidence of events that occurred many years prior to trial is written evidence, especially when recollection of these events are bound. as in the present case, to arouse profound emotion.

Israel cases cited:

(1) *Cr.A.* 232/55 - *Attorney-General v. Malchiel Greenwald* (1958) 12 P.D. 2017.
(2) *Cr.A.* 57/53 - *Yitzhak Gold* v. *Attorney-General* (1953) 7 P.D. 1126.
(3) *Cr.A.* 22/52 - *Ya'akov Honigman* v. *Attorney-General* (1953) 7 P.D. 296,.
(4) *Cr.A.* 119/51 - *I. Paul* v. ,A*ttorney-General* (1952) 6 P.D. 498.

A. Rosenblum and *E. Borstein* for the appellant.
S. Kwart, Deputy State Attorney, and *D. Libni* for the respondent.

COHN J. The appellant was indicted in the TeI-Aviv Jaffa District Court on twelve counts, all under the Nazi and Nazi Collaborators (Punishment) Law, 1950. He was found innocent on seven of the counts, and convicted on five, namely counts 1,2,6,7, and 11. He appeals against conviction on these five charges, and I will consider them in the order in which they appear in the indictment.

The first count charged the appellant with delivering up persecuted people to an enemy administration, an offence under section 5 of the Law. The details of the offence as specified in the indictment are as follows:

> "On an unknown date in the summer of 1942, or thereabouts, during the period of Nazi rule in Poland which was an enemy country, in the city of Bendin, the appellant, in his capacity as chief of the Jewish police, was instrumental in delivering up persecuted people to an hostile administration, in that, together- with others, he collected and arrested tens of Jewish children from the municipal orphanage, dragged them by force from the building and delivered them up to the Gestapo, and assisted in their transfer to railway carriages which took them to the Nazi extermination camp."

Section 5 of the Law imposes a penalty of up to ten years imprisonment on "a person who, during the period of the Nazi regime, in an enemy country, was instrumental in delivering up a persecuted person to an enemy administration."

In its judgment the District Court had this to say on the issue:

> And this is the story of Abraham Fishel, which we believe, although we are aware that we are relying here on the evidence of a single witness. This was during one of the "actions" in the summer of 1942. The quota for the "transport" was short of a few people, and so it was filled *inter alia* by taking children from the orphanage. The witness Fishel and

other kitchen workers, who knew of the "action" that morning hid 50 to 60 children in the attic of the large building. These were children aged 8 to 13 approximately. The children were hidden in the attic for about haIf a day and the kitchen workers brought them water to drink. Then a group of Jewish policemen, with the accused at their head, went up and brought the children down by force. The witness, being a resident of Bendin, knew the accused and his family, the father of the accused, a barber by profession and honorary secretary of the HaKoach sport club, and the accused himseIf, who was known to the witness as a pianist. In order to bring the children down to the courtyard of the building, which had several floors, the Jewish policemen formed a chain. At the same time a number of the older children managed to scatter into the rooms and the floors from the top to the bottom. The other children were taken out according to the number needed to complete the "transport". Some of the children remained, and some joined the "transport".

There is no doubt that all this proved that the accused was instrumental in handing over these Jewish children to the enemy administration ... by bringing them down with force from their hiding place in the attic of the orphanage, with the Jewish policemen under his command, and attaching them to the "transport", which was being sent to extermination. Even though all the details of the offence were not fully proved, as specified in that count of the indictment, the facts that were proved and are mentioned above cover all the essentials of the said offence" (paragraph 12 of the judgment).

It also appears to me that even though it was not proved that the appellant assisted in transferring the children to "the railway carriages which took them to the Nazi extermination camp" as stated in the indictment, the arrest of the children for the purpose of attaching them to the "transport" to complete the quota, constitutes being instrumental in their delivery to an enemy administration, as stated in section 5 of the Law.

The only question before us as regards this count is whether there was indeed sufficient valid evidence on which to base the conviction of the appellant. It is true that a

court, in any criminal case, may convict on the evidence of one person; and if the court has duly "cautioned" itself, as the District Court did in the case before us, the rule is that an appellate court will not interfere.

This is the rule and there are exceptions to it. I do not wish, and for the purpose of deciding this appeal I do not need, to determine exactly when an appellate court will depart from the rule and when it will not. In this appeal the reason and justification for so departing lies in the unique circumstances which exist regarding offences committed by persecuted people during the Holocaust and under an enemy administration defined in the Law. Let me say at once, that I cast no doubt on the reliability and integrity of the witness Fishel. The District Court saw and heard him and was deeply impressed by the pain and sincerity with which he testified; nor do I challenge the finding of the court that the testimony of this witness was, at least from the subjective viewpoint of the witness, completely truthful. But it seems to me that the court should have weighed the probative value of this evidence not just from the point of view of its credibility in itself, but as one link in the chain of all the other evidence, brought before the court and accepted by it as being credible, regarding the events of that period and in that place and the character and actions of the appellant. If the credible testimony of Fishel fits well into and is consistent with the other evidence, even if that other evidence did not corroborate it in the technical sense, the conviction of the defendant might reasonably be based on that testimony. But this is not the case when the credible testimony is exceptional and the other evidence raises doubts as to whether the testimony is based on misapprehension, even in good faith, or as to whether the recollection of the many different horrors which the witness saw with his own eyes or experienced became blurred and confused during the course of the twenty years that have passed since then.

Twenty-three witnesses appeared before the learned judges, ten for the prosecution and thirteen for the defence. Most were from Bendin, and all were Holocaust survivors: virtually all were actual eyewitnesses to the events of those days of storm and terror. Aside fom Fishel, one other witness, Waxelman, to whose testimony I will later turn, was able to recount the story of the abduction of the children from the orphanage, whilst another witness, Arieh Li'or, heard of the incident by hearsay, apparently from Fishel himself. The other twenty witnesses, as it were, had never in their lives known or heard that the appellant, or someone acting under his orders, had arrested children in the orphanage and

taken them to fill the quota of the Nazi "transport". Furthermore, numerous books and articles written on the destruction of Bendin were produced in the court, some written at the time of the Holocaust itself (the diary of the late Haika Klinger) and some written, as the court said in its decision (p. 2). "by survivors of the Holocaust soon after their escape from the Nazis' claws". Even those written afterwards were written a long time before the giving of evidence in court. This court has already said per Agranat J. that to prove the events that occurred many years ago written evidence set down during that period in question or shortly thereafter is preferable to evidence given under oath in court. *(Attorney-General v. Greenwald* (1) at 2088). And here, not one of the books or articles mentions or even hints of the incident of the abduction of the children from the orphanage.

In this instance, one cannot say "What hasn't been seen isn't evidence". These books and articles were written with the express purpose of relating the Nazi atrocities in destroying the Jewish community of Bendin, and the testimony given in court had the express purpose of telling about the deeds of the appellant during the period of the Holocaust in the city, both the good and the evil. A careful reading of all the testimony and exhibits discloses a description of the events that took place at the time to the Jewish community of the city, including many different incidents that in no way approach, in the cruelty of their execution and in the very nature of their evilness, the abduction of the children. It is simply not possible and it is inconceivable that an incident like this could have happened and been committed by one of the Jews, or even by the Jewish police, without the entire community knowing of it and being shocked, and without it being written of in the histories of the times.

Most of the books and articles were actually submitted as exhibits by the defense. There was good reason for this, for in many of them the appellant is praised (as commander or deputy commander of the Jewish militia) and in none of them is he condemned. One of the authors who testified at the trial as a witness for the prosecution said that he had wanted to set down in his book the good things the appellant did and not the bad things. This is not only untenable but clearly a lie. How was the appellant different from other Jews condemned in his book? How did their evil deeds set down in the book differ from the evil deeds of the appellant which were not? And if one is writing a history of the Holocaust how can some things be revealed and others concealed, all according to the tendentious leanings of the author?

Another witness who wrote an article which appeared in a memorial book on the Bendin community, explained his silence concerning the appellant's acts b the fact that the editors of the book shortened his article and did not publish all he had wished. This explanation is also unconvincing, if only because the witness was not requested and did not offer to present to the court those portions of his article which were allegedly not published at the order of the editors. Indeed, I have studied that memorial book and found in the witness' article and in the articles of many others, express accounts of shocking acts and cooperation with the Nazis committed by the Jews. and if the article had contained the story of the appellant's acts, there is no doubt that it would have appeared as written by the witness.

Insofar as concerns the oral evidence, the Deputy State Attorney says that if it does not confirm Fishel's account, that is because the other witnesses were not asked or examined on this issue. After the prosecution had proved what it had to prove by the testimony of Fishel, there was no longer any reason or point to examine later witnesses on this matter. This answer does not appear to me to be any more reasonable than the answers of the authors. Firstly, the prosecution could not know if Fishel's testimony would be considered credible by the court, and out of pure caution it should have tried to prove the event in issue by other evidence as well. Secondly, dozens of other acts and issues, including some not even mentioned in the indictment, were the subject of examination by the prosecution of witness after witness. Why should just this event, the subject of the first count in the indictment and the most serious and horrible of all the crimes with which the appellant was charged, be so different that none of the witnesses who were likely to have known about it, even if only by hearsay, were questioned? And thirdly, and most important in my view, the prosecution knew very well from the start that it had no direct evidence to prove the allegation other than the testimony of Fishel, since, with the exception of the witness Arieh Li'or, who knew of the event only by hearsay as mentioned, no hint or suggestion of the allegation is to be found in all the statements taken by the police from the other witnesses. The prosecution could rightly assume that had they known of an atrocity such as this, they would have told about it in their statements to the police.

It should be pointed out that the evidence of Fishel is surrounded by more than a bit of mystery, and I am not certain that the rights of the appellant were not prejudiced

procedurally. Fishel did not give the police any statement, for the simple reason that the police did not know at all of his existence. On 1 December 1960, the police sent its file to the District Attorney and after counsel had read the statements of the witnesses that were in the file, he invited the most important of these witnesses to conversations with him, among them Arieh Li'or. In the conversations Li'or revealed to the prosecutor that someone by the name of Fishel could testify to the affair from personal knowledge, and one may assume that it became evident to the prosecutor there and then that Li'or himself could give only hearsay testimony. On 3 April 1961 the District Attorney wrote to the Jewish Agency in Ramleh and asked for the address of Fishel: Li'or had apparently said that Fishel worked in the Jewish Agency in Ramleh, or that he could be traced through the Agency. In any event, the Jewish Agency immediately replied that Fishel did not work for it and that it had no idea where he lived. On 28 April, 1961 the charge-sheet was delivered to the appellant, under section 5 of the Criminal Procedure Amendment (Investigation of Felonies and Causes of Death) Law, 1958, in which appeared a count which described the abduction of the children; the list of witnesses contained not only the name of Fishel, but his address "Jewish Agency for Palestine, Ramleh". When counsel for the appellant asked to examine the evidence in the hands of the District Attorney, under section 6 of the same Law, he did not find any evidence from a witness of the name of Fishel. He wrote to the District Attorney on 5 October 1962 and asked him to produce this evidence; to that he received a reply from the District Attorney that he would not use Fishel's testimony in the preliminary investigation and if it were decided to call him as a witness in the trial, he would first send the appellant the notice required by section 38 of the Criminal Procedure (Trial upon Information) Ordinance. On 13 November 1962 the preliminary investigation began. Arieh Li'or testified, and on the same day Li'or notified the District Attorney's office of the correct address of Fishel. On 4 January 1963 an indictment was preferred in the District Court (bearing the date 27 December 1962), with the name and address of Fishel listed as one of the prosecution witnesses. On 10 March 1963 that indictment was replaced by an amended one, and only then was a notice sent to the appellant in accordance with section 38, containing a summary of Fishel's story about the abduction of the children. On the following day, 11 March 1963, the trial began. Fishel appeared at the District Attorney's office and apparently gave his detailed statement on 22 March 1963, even though in his testimony in court he stated that he had known of the trial of the appellant a whole year before.

These facts - which were confirmed by the Deputy State Attorney and were not brought to the attention of the District Court - give rise to great astonishment. The count concerning the abduction of children is already to be found in the charge-sheet. The only statement in the police file upon which it would have been possible to base this charge was the statement of Arieh Li'or (which was not presented to the court because of the opposition of counsel for the appellant), and I must presume that it was only possible to conclude from the language of the statement itself that the witness knew of the incident from hearsay. But after the District Attorney had talked with Li'or and got from him the name and (incorrect) address of Fishel, he probably knew already that Fishel was an eye-witness, whilst Li'or could only testify about what he had heard from Fishel. Otherwise, one cannot understand why Fishel's name and address (the incorrect one) was entered in the notice of indictment when it was possible to prove the count from the testimony of Li'or alone and impossible to know whether they would succeed in finding Fishel and what precisely he would say. Had the preliminary investigation been completed, and had counsel for the appellant not agreed to setting - down to trial before he had examined all the witnesses, it would have been clear at this stage that the testimony of Arieh Li'or did not constitute direct and certain proof of this count, and there are reasonable grounds to suppose that the judge who conducted the investigation would not have charged the appellant with this count, since the testimony of Fishel was not yet in existence and no one knew what it would be.

If it be said that the giving of notice under the above-mentioned section 38 was enough to cure all defects, I would answer that such a notice is not similar to the statement which the witness gave to the police, insofar as concerns his cross-examination in the trial. And if the matter is of little importance concerning a witness who is not the only witness to a certain matter, it is of great importance concerning a witness whose testimony is the only evidence to prove a charge. The adversary system which we follow in trials regards cross-examination as outstanding for revealing the true face of lying witnesses, and this is where cross-examination is one in which the examiner will have at his disposal all the tools which the law permits to be used for this purpose. One of these tools is the test of a witness' consistency: by showing that his prior statements and declarations on a certain matter, which contradict his testimony (in court) or do not correspond to it, it is sometimes possible to induce the court not to place any faith on his testimony. These are things that any school-boy knows. Not only was the present appellant deprived of the opportunity of

examining Fishel on his statement to the police, and thereby testing his consistency, but we found upon reading the judgment of the District Court that the learned judges rightly attached special importance to the differences between the statement of a witness to the police and his testimony in court, and the omission of a certain matter from the police statement was one of the reasons which led the court to refrain from attaching evidence or weight to the testimony of the witness on that matter in court.

What happened was that the witness Reuven Waxelman, who was in 1942 a boy of 10, also testified in court about the abduction of the children from the orphanage by the appellant and his henchmen. In his statement to the police he did not mention this incident at all. It is true that the court saw fit not to rely on his testimony both because he was a child at the time and because contradictions were found between his testimony on other matters and most of the other testimony. But the court also pointed out that the fact that in his statement to the police, "he did not mention the facts concerning the first count in the indictment", and in the end it was "afraid" to rely on his testimony (paragraph 13 of the judgment). We see then that confronting a witness with the detailed statement which he gave to the police can lead to a situation in which the court will be reluctant to rely on his testimony; and the defect caused by denial of the opportunity for such examination is not always cured by the sending of notice under section 38.

If this defect in the form of presenting the testimony of Fishel had stood alone, it would not have been enough by itself to move me to invalidate his testimony, but this defect is added to the astonishing isolation within which the evidence of Fishel stands, amongst all the other evidence received by the court, and in the absence of any reasonable explanation for the lack of any other admissible evidence as to the horrible incident which must have utterly shocked the entire community of Bendin, I can see no alternative but to give the appellant the benefit of the serious doubts which I feel. And these doubts are not lessened even assuming that the explanation given by the appellant in his testimony (that in fact an act of saving the children was involved that occurred several months later) is incorrect.

It therefore appears to me that the appellant should be acquitted of the charge in the first count.

On the second count as well the appellant was charged with an offence under section 5 of the Law which. as stated. prohibits being instrumental in delivering up persecuted people to an enemy administration.

The second count in the indictment reads as follows:

> In August 1942 ... when commander of the Jewish police in the city of Bendin, Poland, under German rule, the accused was instrumental in the delivery up of persecuted people to an enemy administration by assisting the Nazis to concentrate all the Jews of the city in the sports fields of 'HaKoach' and 'Sermazia' for the purpose of conducting a selection; by keeping order. with members of the Jewish police, during the conduct of the selection; by seeing with others to the transport of thousands of Jews to the places of concentration and guarding of them so that they would not escape, and then to the transport of approximately five thousand Jews, including the aged, women and children under guard in the death carriages.

The District Court found the following facts:

> "A few days before 12 August 1942 the Judenrat (Jewish Council) published notices in which the entire Jewish population of the city of Bendin, from aged to infant, was ordered to appear that day at two concentration points in the city, the grounds of the Jewish sports club 'HaKoach' and of the Polish sports club 'Sermazia', for registration. Propaganda was spread that this was only an operation to check certificates and registration, and that the Jews should wear their holiday clothes and should all appear as requested since disobedience would endanger all. Those who did not obey would not be permitted to remain in the region... In the early morning hours of 12 August 1942. the Jews of the city began to stream in large numbers towards the two above-mentioned sports grounds. According to estimates there were at that time thirty thousand Jews in the city of Bendin, and almost all appeared at these grounds, about fifteen thousand at each. The selection at the

'HaKoach' field was conducted by the German Kuzinski, and at one point people noticed that the field was surrounded by armed Germans. In the ground itself order was kept by the Jewish marshals who wore special hats and carried batons and by a number of Germans. The Jews were sorted into three groups: (a) holders of work permits, who were to be released; (b) people who appeared physically fit to be sent to work camps: (c) elderly people, children and the physically weak who were destined for expulsion, which meant extermination. According to the accused's testimony there was a fourth group of people whose condition required a second examination, for the purpose of reselection and sorting within the three above-mentioned groups.

The task of the Jewish marshals under the command of the accused was to prevent the assembled people from moving from one group to another. Each group was assigned a special place on the field, and when people began to understand the significance of the selection and the dangers in store for those of the third group and to some extent also of the second, attempts began to be made to move from group to group, and the Jewish marshals together with the Germans who were in the ground prevented this by force. The orders to prevent movement from group to group were given by the accused to his subordinates, the members of the Jewish militia at the place, and this alone is enough to show instrumentality in delivering up persecuted people to an enemy administration... and this is regardless of whether there were any prospects that those who were attempting to move from group to group would thereby succeed in escaping their expected fate (Judgment, paragraph 3).

It follows that it was not proved that the appellant assisted the Nazis in concentrating all the Jews of the city onto the sports grounds or that he saw to the transport of the Jews to the places of concentration and from there to the death carriages. The only particular of the offence under this count which remained was that of "keeping order (at the sports grounds], with members of the Jewish police, during the conduct of the selection." While

keeping order he gave the order to his subordinates not to permit people to move from group to group.

These facts were no longer in dispute before us, and the question which concerns us is a legal one whether these facts disclose a criminal offence. The District Court was silent and did not explain how it saw in the giving of orders by the appellant to his subordinates, the offence of being instrumental in the delivery up of persecuted persons to an enemy administration. One gets the impression, on reading the judgment which is clear and well reasoned, that the matter appeared obvious in the eyes of the court. What occupied the court in this matter was not the *actus reus*. but the *mens rea* alone. In my opinion, the question of criminal intent does not even arise since no criminal act was committed here.

There are five elements to the offence under section 5 of the Law, namely:

(a) being instrumental
(b) in delivering up
(c) a persecuted person
(d) to an enemy administration
(e) in an enemy country during the period of the Nazi regime.

I will not dwell on the first, the third and the last of these elements; the third and the last because no doubts, whether of fact or interpretation, arise in regard to them; and the first, because the interpretation of the term 'instrumental' is not required here and I prefer to postpone it to another occasion. The second and fourth of these elements remain for consideration and I will deal with them together.

"Delivery" may be by physical delivery or by giving information. Not only has the word "deliver" borne these two meanings in the Hebrew language, at all times but insofar as the danger to the life of the "delivered" person is concerned, and therefore insofar as the injustice contemplated by the Law, it makes no difference whether the delivery up was physical or whether only information was delivered which led to seizure of the person. The common factor in both modes of delivery is that the act of the "deliverer" was the cause (albeit perhaps not the only cause) for the *arrest* of the "delivered" person being seized by the enemy administration. This means that one who has already been seized by the enemy

administration cannot further be delivered up to it. Physical delivery will be pointless, since the person is already physically in its hands, and the passing on of information will be pointless, since the information is of no use when the person is already in its hands. Such delivery is comparable to an attempt to commit a crime against something which no longer exists, such as the killing of a man who is dead.

The Jews of Bendin who were concentrated on that tragic day in the sports grounds were all in the hands of the enemy administration, witness the fact that the grounds were surrounded by armed Germans and that not only members of the Jewish militia but German troops as well kept order. The representative of the enemy administration who conducted the selection held in his hands life and death; at his wish a person could be sent to one or another group and nobody could change his decision. If the appellant was not instrumental in delivering up the thirty thousand Jews of Bendin to the Germans, by having delivered them up at the sports grounds or having acted so that they should present themselves there, how and in what way was he instrumental in delivering them up to the Germans, after they were already there?

The Deputy State Attorney says that the appellant was instrumental in delivering up Jews by having ordered his subordinates to prevent escape. I am prepared and obliged to assume that there indeed existed at the time of the "selection" a chance to escape, or at least a chance to move from group to group. If such opportunity existed I have no doubt that any act which was done to deny or restrict this opportunity is criminal and wicked and cannot be justified. But may we say that the prevention of escape from an enemy administration is equivalent to delivery up to that administration? I am afraid that in so doing we exceed by far the widest meaning which the word "delivery" bears. We are dealing with criminal offences, and the most serious of them, and it is an important and simple rule that a court may not extend their application by way of judicial interpretation beyond the meaning of the words which the legislator saw fit to use. It is indeed likely and as regards the expected danger to the persecuted person that there is no difference between his delivery to an enemy administration and preventing his escape from it; but whilst the delivery into its hands has been declared by law to be a criminal offence, the prevention of escape from it was not declared to be an offence;and there is no punishment except by law. Punishment by analogy or logical reference instead of under express provision of law alone is in the province of states which do not function under the rule of law and we have no truck with them. The danger that the perpetrator of a criminal and wicked act as aforesaid

will not be brought to justice, is outweighed by the danger of a court imposing punishment not under clear and express law.

The result is that there could not be here any delivering up to an enemy administration, when the Jews were at that moment already in its hands, and so there could not be any act of being instrumental in such a delivery.

It appears to me, however, that the appellant also has another line of defence under section 10(b) of the Law, which states:

> "If a persecuted person has done ... any act, such act ... constituting an offence under this Law, the Court shall release him from criminal responsibility -
> ...
> (b) if he did ... the act with intent to avert consequences more serious than those which resulted from the act ... and actually averted them...."

No one disputes that the appellant was also a "persecuted person" within the meaning of the Law, and his counsel argued that, in giving orders to his subordinates to prevent movement from group to group, the appellant intended to prevent the Germans from opening fire on the crowds and in fact did prevent this result. The Deputy State Attorney responded to this argument with two points. Firstly, he says, the appellant did not testify in the District Court as to any such intention, and accordingly how is it possible to impute to him such an intention when he himself did not testify to it? Only during re-examination, at the end of his lengthy and detailed testimony, did the appellant mention the possibility that the Germans would have fired into the crowd. But here as well he did not connect this possibility with any particular intention on his part which motivated him as it were to act as he did . Secondly, who amongst us can say that firing into the crowd by the Germans was indeed "a consequence more serious than those which resulted from the act" of the appellant? By preventing change from group to group people were sent to certain death, whereas it is possible that no one would have been injured by the firing of shots or that only a few would have been injured.

According to the terms of section 10, the accused is to be released from criminal responsibility if the circumstances described in the section exist; it is not said that the

accused will be released from criminal responsibility if he proves that those circumstance existed. In structure section 10 is similar to section 19 of the Criminal Code Ordinance 1936, and not to other sections (like section 18 of the Ordinance) which expressly place the burden of proof on the accused. And it seems to me that the rule laid down by this Court *(Gold* v. *Attorney-General (2)* at 1140) applies in this case. There Agranat. J. said:

> the accused is presumed innocent and the prosecution must prove his guilt of the offence attributed to him beyond all reasonable doubt. This principle also applies, in our opinion, where the accused ... pleads justification under section 19 of the Criminal Code Ordinance, 1936, inasmuch as the legislator did not place on the accused the burden of proof as regards this plea, as it did with the plea of necessity (section 18) or insanity (section 13). It is true that if the evidence does not contain any support for the plea of justification, the prosecution need not confute it. But if the accused succeeds in pointing to testimony, be it found in the evidence adduced by the prosecution or the evidence brought by the defence, which raises reasonable doubt as to the truth of the said plea, the prosecution will not have proved its case, so long as it has not removed this doubt.

Thus also in our case: so long as there exists in the evidentiary material some "support" for the defence plea mentioned in section 10, the prosecution has the burden of proving that the accused is criminally responsible and is not entitled to be released from criminal responsibility, and it makes no difference whether this support is based on prosecution evidence or defence evidence.

Examination of the evidence shows, as stated, that the sports ground was that day surrounded by German soldiers armed with machine guns. In one of the books, the diary of the late Haika Klinger, it is even written that shots were fired by the Germans during the "selection". In another book, (by Rantz, in English) it is stated that not only was the ground surrounded by armed Germans but that so also were the special groups which were singled out to be sent to the camps. The appellant could and should have assumed that these Germans would not hesitate for even an instant to use their weapons and open fire, if any "mishap" occurred and all did not go as planned. The appellant could and had also to fear

that if the Germans opened fire, they would shoot into the crowds without restraint or distinction and not bother about who fell and how many fell; these Germans were not suspected of being capable of firing only warning shots into the air. In these circumstances keeping order in the sports ground might have prevented more serious consequences, namely the opening of machine gun fire on a great crowd of people. Since there is nothing at all in the evidence to support the contention that the appellant intended to assist the Nazis in their acts of extermination (the District Court in its judgment expressly ruled out such an intention), it is reasonable that the appellant kept order with the intention of preventing the Germans from opening fire, that is to say, with the intention of averting that more serious consequence.

In my opinion it makes no difference that the appellant himself did not testify as to his "intentions" in giving the orders in issue to his subordinates. Had he clearly testified today that his intention then in giving these orders was to prevent "the more serious consequence" of the Germans opening fire on the masses concentrated in the sports ground, I would have regarded such testimony with great suspicion, in case it was only hindsight. We must infer the relevant intentions from all the circumstances proved in court; and if this is so as regards criminal intention, either general or particular, in every criminal case, how much more is it so in regard to events that occurred over twenty years ago in an undescribably fearful situation. I can imagine that the order which the appellant gave to his subordinates, to keep order and not permit deviations from the groups, was an instinctive act in the face of the German machine guns. In such an instinctive act, no person can give an account of his intentions and by the same token later testify to these intentions. Even if, however, his acts were instinctive as aforesaid that does not prevent the existence of "intention" within the meaning of section 10 of the Law. One may perhaps go further and say that there is no stronger and better support for the existence of that "intention" than the instinctiveness of the reaction.

The learned judges denied that the appellant had the intention spoken of in section 10(b) of the Law, attributing to him other intentions which, if I have understood their reasoning, do not correspond in their opinion to this intention. The appellant, they say in their judgment,

> "thought mainly of himself and his family, and in the post of commander of the Jewish militia he saw, up to a certain stage immunity and protection for himself and his family, and employment which protected him from hard physical labour and provided the opportunity to ensure for himself and for the members of his family tolerable sustenance and living conditions in the hell of those days." (paragraph 9 of the judgement).

And they add

> "The intentions of the accused - when he persevered in his position of authority as deputy commander of the Jewish militia in Bendin and accepted the task of keeping order over the Jewish who were to be concentrated on the 'HaKoah' ground, although he already knew... that the purpose of the concentration was "selection" and what the fate of the elderly and the children would be after that selection, and when he carried out the guard duty as he did in preventing movement from group to group - were not to avert more serious consequences, but were selfish" (paragraph 7 of the judgment).

A psychological analysis of the motives of the appellant in joining the Jewish militia and in accepting the position of command over it is as it may be, and I do not wish to cast any doubt on its correctness. But as far as concerns the diligence of the appellant in fulfilling the task he had taken upon himself, I fear that the learned judges deceived themselves as to the freedom of choice of the appellant to carry on or resign. Be this as it may, in this matter the court confused the selfish motives of the appellant in joining the militia and his diligence in fulfilling his duties with his intentions in ordering his subordinates, as commander of the militia, to maintain order in the sports ground. The fact that the appellant reached his position and was diligent in it for selfish reasons does not negate or contradict his intention of averting more serious consequences for the Jews, by giving on that special occasion the orders in question.

The second argument of the Deputy State Attorney was, as will be recalled, that there was no danger in this case of "a more serious consequence" within the meaning of section

10(b). Even if we assume he submits, that the Germans would have fired and victims have fallen, we cannot know whether the number of those who might have escaped from the group designated for extermination would have exceeded the number of fallen victims, had the militia not maintained order. The learned judges of the District Court also considered this aspect of the problem, and they ruled that the intention of the legislator was not, by granting release from criminal responsibility under section 10(b) of the Law, to justify the delivering up of a single Jew for killing, even to save other Jews. They put it as follows:

> It appears to us that the intention of the Israeli legislator was to justify the commission of an act which would cause less serious damage to a persecuted person or persons, in order to avert more serious consequences for that persecuted person or even for individual persecuted people, but it did not intend to justify acts which caused serious injury to certain persecuted persons in order to avert serious injury to other persecuted persons. In other words, the legislator did not intend to justify being instrumental in the sacrifice of thousands of Jews, so as to prevent the same serious consequences for other thousands of Jews, and in such action there is no averting of more serious consequences, according to the spirit of the Law and the intention of the legislator." (paragraph 8 of the judgment).

It is a basic principle of interpretation that the intention of the legislator is to be sought in the language of the Law alone. Where the language is clear and does not admit of two meanings, there is no need to search for the presumed intention of the legislator. The question of what is a more serious consequence and what a less serious one, is primarily an objective question; and objectively, it is obvious that the death of ten is a more serious consequence than the death of nine people and that the death of one is a more serious consequence than the injury of ten. But an objective standard such as this will only rarely be at the disposal of the court; usually it is not possible to measure the consequences, those which were caused and those averted, by such a standard, since both these results are conjectural. And since we are speaking of causing these consequences "with the intention" of averting others, it is reasonable to recognise in this matter a subjective standard as well, the standard of the person holding the intention: whether he caused one consequence, with the intention of averting another consequence which was, to the best of his knowledge,

more serious, and whether he indeed prevented that more serious consequence, since then he is released from criminal responsibility, provided that the consequence which he intended to prevent indeed was and could objectively, which is to say reasonably, be considered, to be more serious than the other consequence. This is to my mind the correct interpretation of section 10(b) in its plain meaning. We should not read into it things that are not there, even if they seem to us to be morally or traditionally binding.

If we apply the provision of section 10(b), in its fore-going meaning, to the actual facts before us, we find that the appellant did not know, and could not know. how many Jews would succeed in escaping death by moving from one group to another, or how may Jews would fall if the Germans opened fire. In the situation in which the appellant found himself, he had no objective opportunity or subjective experience with which to measure one against the other with regard to the number of victims, the consequences of maintaining order and of fire being opened. There was no objective opportunity, because it was impossible to know in advance how many would succeed in escaping, just as it was impossible to know how many would fall as casualties. And I am inclined to think that the appellant also had no subjective experience; but had he tried to estimate the two conjectured results. one against the other, I would decide in his favour if he thought that the number of those who would succeed in escaping from under the eyes of the German sentries would be small, whilst the number of those who would be killed with the opening of fire would be large. For me, any possibility that such would be the case is enough to place his intention within the framework of the statutory defence.

It also appears to me that both objectively and subjectively, there is another reasonable standard with which to measure the two alternative consequences, namely, immediate death, on the one hand, and the danger of subsequent death on the other. A person who faces a choice of immediate death, even of a few, as against the danger of subsequent death, even of many, is entitled to say, "I chose the danger of death for many, so as to prevent the more serious consequence of the immediate death of a few". Even if the appellant knew that all those in the third group were designated for extermination, he could still say, "I will not abandon all hope for their being saved, for who knows what the day will bring, and one should never give up hope". In fact, many of those in this group were saved after nightfall, unlike the bloodshed of shots fired into a crowd; he who is wounded is wounded, and death is as certain as it is quick, and there is no refuge from it.

Accordingly, release from criminal responsibility for his actions is available to the appellant, since there is support in the evidentiary material for his intention to avert the more serious consequence of the Germans firing into the crowd by giving instructions to maintain order in the sports ground, and in fact the more serious consequence was avoided by maintaining order.

The sixth count charged the appellant with assaults in places of confinement, an offence under section 4 of the Law. The particulars in the indictment are as follows:

> During the period of the Nazi regime, on unknown dates in 1942 and 1943, in Bendin, Poland, which was an enemy country, (the accused) whilst serving as commander of the Jewish police, assaulted without their consent a number of persecuted Jews, by seizing and pulling them by the hair, beating them and kicking them.

Section 4 of the Law empowers Israeli courts to try assault (and other offences detailed in the section) every person who committed the offence "during the period of the Nazi regime, in an enemy country, and while exercising some function in a place of confinement on behalf of an enemy administration or of the person in charge of the place of confinement," provided the act was committed "in that place of confinement...against a persecuted person."

It should be pointed out that the particulars of the offence in the indictment does not mention the place of confinement where the appellant committed the acts with which he is charged. This may be because the various acts were committed in different places of confinement. As counsel for the appellant did not raise any objection to this flaw in the indictment, I will also ignore it.

All that remains in the judgment of the District Court of this charge of seizing and beating and pulling and kicking persecuted Jews is one incident in which the appellant pushed a woman by the name of Wilder, when she approached him in the kitchen of the Jewish orphanage and asked him to have pity on her (paragraph 16 of the judgment). The District Court ruled that this act of pushing was committed in a place of confinement

within the meaning of the Law, since it occurred in the Jewish quarter of Bendin "in which Poles were forbidden to live and from which Jews were forbidden to leave except with special work permits". As a result, the Jewish quarter was a "place in an enemy country which, by order of an enemy administration, was assigned to persecuted persons", this being the definition of "place of confinement" under section 4(b) of the Law.

The trouble is, however, that the orphanage, in the kitchen of which the pushing incident occurred, was not in the Jewish quarter but outside it (testimony of Eliezer Rosenberg, at p. 136). The Deputy State Attorney was forced to argue that the orphanage as such, at least during the days of the "actions", was a place of confinement within the meaning of the Law. I am doubtful whether the fact that the Nazis used to gather in the orphanage the Jews who were assigned for transport and send them from there on their way, is of itself enough to give the orphanage the character of a "place of confinement". But even if 1 accept that the orphanage was a place of confinement during the period of the "actions", I still fail to see how it is possible to say that the appellant exercised in that place some function "on behalf of an enemy administration or of the person in charge of that place of confinement". If the orphanage is to be considered a "place of confinement", simply by reason of Nazi actions on those special days, it is clear that the person in charge of that place of confinement was the Nazi authority responsible for these 'actions': and no one denies that the appellant did not exercise any function on behalf of the Nazis.

Nevertheless, in my view, the term "place of confinement" in section 4(b) requires strict interpretation. It is not possible, for example, to consider a synagogue as a place of confinement, even though it was also assigned to persecuted people, possibly by order of the enemy administration. The synagogue was assigned to persecuted people not as a place of confinement but for the purpose of religious worship and other purposes valid in the eyes of the law. In my opinion "place of confinement" is only a place designated for persecuted people, by order of the enemy administration, for the purposes of confinement and persecution, as opposed to a place assigned to them for their own legitimate purposes.

The incident of the pushing of Mrs. Wilder was also proved on the basis of one piece of evidence alone, the testimony of the witness Fishel who had also testified about the abduction of the children from the orphanage. The evidence of this witness, as stated, was believed by the court, and there is no formal objection to resting the appellant's conviction

on the evidence of one person, especially a court which first cautioned itself as required. But it seems to me that the same considerations which led me to invalidate the conviction on the first count of the indictment apply here as well. If we look at all the evidence in its entirety, we get a picture of the appellant as a mild man, perhaps weak and selfish, but in no way violent or cruel. No proof or argument was put in that might explain the aggressiveness of the appellant particularly against this woman: and it is difficult to imagine that he would just pick on a woman in the kitchen of the Jewish orphanage, when and where only Jews were present, without reason or cause.

The Deputy State Attorney referred us to the decision of this Court in the *Honigman* case (3) where Cheshin J. ruled that one may convict on the testimony of a single witness in a case like this, for the very reason that such abject cases of injury in Nazi places of confinement are engraved in the memory of those injured and never forgotten. But he was speaking of cases where the witness suffered the injury in his own person and not of injury to others. Furthermore, and this is crucial in my view, that only applies to an accused of whose cruelty and aggressiveness a great deal of evidence has been adduced in court, where only for a few isolated cases it is necessary to rely on uncorroborated evidence. It is otherwise here; no evidence was produced of the appellant's cruelty or aggressiveness, and the only case which concerns us rests on uncorroborated evidence which is extraordinary and does not fit in with the rest of the evidence produced.

I would acquit the appellant on the sixth count as well.

The appellant is accused in the seventh count of a further assault under section 4 of the Law. The indictment says:

> During the period of the Nazi regime, on an unknown date in 1942, or at the start of 1943, in Bendin, Poland, which was an enemy country, the accused, while exercising the function of commander of the Jewish police on behalf of the Nazi regime, assaulted, near the orphanage, a persecuted Jew named Pikarski, aged 60 approximately, by beating him, with others, and striking him with a stick which he carried, in order to force him to enter an automobile.

Here as well the place of confinement is not mentioned in the particulars but the location where the incident occurred, "near the orphanage" is noted. According to the testimony of the witness Arieh Li'or, whose testimony is also the only piece of evidence of this act, the incident took place in the street fronting the orphanage. I have already said that the orphanage, and obviously the street fronting it, were not in the Jewish quarter which the court regarded as a "place of confinement" as defined in the Law, and if it is still possible, and then only with difficulty, to regard the orphanage itself as a place of confinement, at least in the days when Jews were concentrated there, the street in front of the orphanage cannot be considered a place of confinement. For this reason alone there was no occasion to convict the appellant of this count.

Furthermore, what I have already said regarding the uncorroborated testimony of Fishel applies to the uncorroborated testimony of Arieh Li'or, and in light of all the evidence which was produced in court, I cannot see any basis on which to convict the appellant of this offence on this uncorroborated testimony.

The appellant is also charged with an offence under section 4 of the Law in the eleventh count, but the offence is not assault but forced labour (section 261 of the Criminal Code Ordinance, 1936).

The particulars in the indictment are that:

> During the period of the Nazi regime, in the period between May 1942 and the end of 1943, on unknown dates, in Bendin, Poland, which was an enemy country, in which the accused served as commander of the Jewish police, he unlawfully compelled persecuted Jews to work in forced labour camps, against their will, in the service of the Nazi regime.

The District Court found the following:

> During the entire period from the beginning of his work in the militia, the Germans demanded that Jews be found for forced labour...and it was one of the tasks of the Jewish militia to search out for such people

> and to bring them in... While exercising a position of command, either as deputy commander or as commander, the accused decided which policemen would go around the houses to find people required for work, and he also commanded the policemen to search in cellars and attics for people whose names appeared on the Judenrat's work lists. Those that were arrested (the accused said "that we arrested")... were transferred to the work camps.

As regards the conviction on this count, I am prepared to assume that all these actions were carried out in the Jewish quarter which according to the decision of the District Court was in the nature of a "place of confinement", and I am also prepared to assume that the appellant committed these acts by virtue of the position he occupied for the enemy administration, "to produce Jews for forced labour".

But here the appellant may rely with greater force on the defence provided by section 10(b) of the Law. The Deputy State Attorney was also not prepared to dispute that had people not been sent to work camps, they would almost certainly have been sent to extermination camps. And it is likely that the appellant did what he did in order to avoid this consequence, which was much more serious in all respects, and in fact he did prevent the dispatch to the death camps of those Jews who were sent to the work camps, whether they were saved in the end or were killed. At the conclusion of his submissions the Deputy State Attorney declared that he would leave to our discretion the decision to uphold or quash the conviction, which is a polite and refined way of admitting that he cannot support the conviction.

I therefore see no need to consider the argument of counsel for the appellant that in any event the criminal intent of the appellant under section 261 of the Criminal Code Ordinance, 1936, was not proved. The appellant is also to be acquitted on this count.

These are the reasons which have led me to accept the appeal, to quash the decision and sentence of the District Court, and to acquit the appellant.

OLSHAN P. In law there is no bar to conviction of an accused for an offence under the law in question on the basis of the testimony of one witness. Therefore, in this regard

one cannot find any fault in the judgment under appeal. The question is, however, *should* there have been a conviction on the basis of uncorroborated testimony, in the light of all the circumstance and all the evidence in this trial.

In England, for example, it is possible in point of law to convict for a sexual offence on the basis of the uncorroborated testimony of one witness. Nevertheless, considering the circumstances, and in this case the nature of the offence, a principle, as it were, has grown up that corroboration is desirable, and jurors are always warned of this.

The question then is when, in trials under this Law, is corroboration required to found a conviction and what circumstances justify this requirement, which weighs heavily on the prosecution upon whom rests the burden of proof? A further question is why did the legislator not prescribe this requirement as an express provision of the Law instead of leaving the matter to the discretion of the court?

The Law in question embraces in fact two categories of accused: (a) "persecutors" - belonging to an enemy organization, as defined in section 3 of the Law, who committed offences against persecuted people and (b) "persecuted people" - the victims of the "persecutors", who committed offences against other persecuted people.

The legislator did not see fit to fix a rigid standard concerning the amount of proof required for each category of accused dealt with by this law. When the accused belongs to category (a), that is, there is no dispute as to his membership in an enemy organization the purpose or one of the purposes of which was to carry out acts of extermination against persecuted persons, the very fact of his membership in the enemy organization is itself a blot against which the testimony of a single (credible) witness to the act may be regarded as more certain. But when the accused is of the second category, his belonging to the camp of the persecuted is certainly no blot; when the alleged offence is proved against such an accused by only one witness, manifold caution is required in the nature of things, as will be explained below, and sometimes it will be dangerous to convict on the evidence of one witness, however credible.

Nevertheless, even in case of this type corroboration is not an absolute condition, since it is possible that in cases of this type as well, the evidence as a whole (aside from the

testimony of the single witness who testifies about the deed, the subject of the charge) may reflect an image of the accused so monstrous as to convince the court that there is no danger in convicting him of the alleged charge even though the deed was proved by the testimony of one reliable witness alone.

A good example of this may be found in the judgments in *Paul* (4) and *Honigman* (3).

In each of these two cases the general background which was proved demonstrated the accused as monsters, ruthless sadists in their maltreatment of persecuted people when under their control in concentration camps. On this matter there was more than one witness. It is therefore not surprising that in *Honigman* the accused was found guilty even though the incident in question was evidenced by one witness.

Mr. Kwart relied on *Honigman* but the case before us is diametrically opposed. Despite his conviction in the District Court, the appellant was not described in any part of the judgment in the way that the criminals in the abovementioned cases were described. When one looks at all the evidence of the prosecution and of the defence, which was credible to the court, there was clearly no occasion for such a description. Furthermore, in pronouncing sentence, it was even said that,

> The accused was not the instigator, but fitted into an establishment that was directed and led by people who were known in the Jewish community as communal workers and spokesmen even before the war, and it was difficult for him to take an independent line and make moral judgments against that leadership, particularly since to follow the Judenrat's line corresponded with his own interests and his natural desire to be saved.
>
> It has already been mentioned in the judgment that the accused did not display in his actions any tendency to cruelty in exercising his powers, and did no more than was required of him in his position, and even helped various people when he could do so without risking his own well-being and position.

And the judgment observes that "We are far from viewing the accused as a sadistic monster, who maltreated his fellow Jews from any low instinct."

It is true that this description in the pronouncement of sentence was given as an extenuating circumstance for the purpose of sentencing, but it appears to us that it should serve as ground for explaining, or fearing, that there was some danger in convicting him of acts the proof of which rested on only one witness. In my opinion one may find in these matters one of the circumstances to justify a refusal to convict on uncorroborated testimony.

Furthermore, the period of over twenty years which has passed since the events of the Holocaust until the appearance of the prosecution witnesses, constitutes another ground. It has already been said by one jurist, regarding compensation claims in road accident cases prosecuted long after the event, that with each period of time that passes after the incident, memory grows weaker and imagination stronger.

Special circumstances may further be found regarding the conviction of the accused on the first count (the delivering up of the children) which is the most serious charge against him. The conviction is based on the uncorroborated testimony of Fishel.

The appellant strongly denied Fishel's story, and testified that after the "action" in August 1942 there was in fact an incident with children whom he tried to save but in the midst of the rescue operation Gestapo men appeared and beat him. The rescue was not completed and he did not return to the orphanage. The appellant offered the explanation that Fishel's mistake derived from this. Although the court had doubts about whether to believe the appellant's story it did not reject it outright but rather his suggestion that Fishel had been mistaken in his story, and it ruled that the incident about which Fishel testified was a different one.

Fishel testified that the incident which he related occurred in May or June of 1942. He said that he and other workers in the kitchen of the orphanage hid the children and fed

them, and that the appellant and the police later removed the children and turned them over to the Germans.

In any event the delivery up of the children was not Fishel's secret alone. It is known from the evidence that the situation in Bendin worsened *after August 1942,* - the "selection". Prosecution witness Isaac Neiman (page 11 of the record) testified that until the end of 1942 the position of the Jews in Bendin was much better than in the territory of the Government-General. Before then also repressive rule prevailed, people were sent to work camps and perhaps even limited expulsions, but not in so regular a fashion that a harrowing act such as the removal of the orphan children from their hiding place and their delivery to the Nazi horde would fail to make an impression on the Jewish public and not be engraved in the memory of the people of Bendin. Yet in none of the books written by the people of Bendin, some even shortly after the war, or in the diary of Klinger, is there any mention of the horrifying incident of which Fishel spoke.

Mr. Kwart argued that the court believed Fishel and raised no doubts as to his credibility. This is correct and the court was certainly entitled to be impressed by Fishel's good faith and feel that he sincerely believed that things happened as he said. In the light of his credibility to the court we do not urge otherwise. But in a criminal trial of this special type, first brought before an Israeli court after more than twenty years, when the accused himself was persecuted, when not one of the prosecution or defence witnesses who were believed by the court portrayed the appellant as a monster, when none of the above-mentioned books, written in particular about Bendin and criticizing severely the Judenrat and the Jewish police, mention this incident, it appears to me that this fact as well is ground which justifies the requirement that conviction of the appellant for the particular event alleged against him should not be based on the testimony of one witness alone, since it is possible that a witness may be very credible and there is not doubt of the sincerity of his testimony and yet the matter may not be exactly as he has testified.

It seems that as a matter of principle the situation is similar to that in England, when the jurors in a sexual offence case believe the testimony of one witness and, despite this, refuse to give a verdict of "guilty" simply because it has been explained to them that in view of the nature of the offence it is not certain, or desirable to convict on the basis of uncorroborated evidence. The difference is that here it is not the nature of the offence but

the other existing circumstances which render it undesirable to convict on the basis of the testimony of one witness.

David Li'or, who wrote his book not long after the Holocaust, was in Bendin during the entire period up until 1944, and until early 1943 with his brother Arieh. He describes the events in Bendin and criticises people as above but he does not mention the appellant in connection with the incident of the children nor speak of the appellant in a negative light. In evidence David Li'or said that he did not mention any Jews in his book because he did not want to open old wounds, except that in two places he praises the appellant.

Let us assume that David Li'or knew nothing of the matter of the children (he also gave no evidence on that) and for that reason did not write about it. One may suppose that people from Bendin who are now in Israel read his book; would they not have expressed to him their dissatisfaction at having singled out the appellant for praise, if the matter of the children had occurred as told by Fishel. It is inconceivable as I have said, that had it occurred as described by Fishel, the matter would not have been known about at the time in Bendin and would have been forgotten by people from Bendin who are in Israel.

The court mentioned several defence witnesses regarded credible by it and noted the *impression* obtained from their testimony, that these witnesses were not happy with themselves since the appellant had done them all good turns in the period after August 1942 and they felt uncomfortable to be ungrateful and not to testify on his behalf. But one can also see from their testimony that before giving evidence, they encountered an unfriendly response from those who knew (apparently those who initiated the prosecution) that they were about to testify on behalf of the defence. One cannot discount the possibility that this too led to their "not being happy". This circumstance also has some bearing on the question whether the court should have been satisfied with uncorroborated evidence.

In paragraph 3 of the judgment a description is given of the establishment of the Judenraten and the Jewish police on Nazi command which "gave them power in that nature of internal autonomy of submissive serfs, and changed them into persecutors of their brothers."

The very existence of the Judenraten and the Jewish police, and their exercise of normal functions, assisted the Nazis, for otherwise the Nazis would not have been interested in establishing and maintaining them. The very existence of this organisation helped the Nazis by providing them with an address to which they could turn with their orders and enforce compliance, such as collectors of the assets and property of Jews and their transfer to Nazis, the supply of Jews to the Nazis for forced Iabour and many other innumerable orders.

In occupied Poland and in other lands of the Holocaust there were many Judenraten, virtually in every city. The Judenraten varied, and one may assume that members of a Judenrat were not all of the same mould in regard to their strength to stand up to the Nazis, preferring suicide to carrying out brutal orders, and in regard to their astuteness and success in softening by ruse the Nazi decrees and in delaying expulsions to the death camps and the like.

In fact, if one analyses the state of affairs in depth, it is impossible to describe the exercise of any function by the Judenrat, which was not of direct or indirect benefit to the Nazis - the registration of residents, the maintenance of Jewish police to keep order in the ghettos or in other places where Jews were to be found, the holding of Jewish delinquents in ghetto jails and so on. Even if these served the interests of the Jewish public, they were also useful to the Nazis, enabling them more easily to find victims for persecution or extermination. This was particularly so with the increase in extermination, when the Nazis exploited this organ frequently by deceit and stratagems of various kinds.

The whole Jewish public was in a confusing position, particularly in the early years of the Holocaust, before they got to know of the deceitful stratagems of the Nazis. Many placed their faith in this organ in the hope that it would successfully manoeuvre, fair or foul means, come to the rescue, put off things and so on. When success was not forthcoming and when there were instances, as there certainly were, in which leaders of the Judenrat appeared brutal in seeing necessary for themselves to choose the lesser of two evils, bitterness against the Judenraten and the Jewish police began to spread.

Jewish youth as well was in a state of confusion. Some of them were not reconciled to the Judenrat system and the Jewish police and there were certainly those who were

contemptuous of them. But they were perplexed and powerless and could not offer any practical alternative to the masses. On page 13 (of the record) Isaac Nieman, a member of the resistance and prosecution witness. testified that the Judenrat believed that through cooperation with the Germans it would be possible to save more Jews, that it opposed and did not believe in the utility of uprisings. "Therefore, we were against them."

On p. 22 he testifies. "The members of the Judenrat worked to prevent uprising, by warning people against hasty actions that would endanger public safety. The public did not know at all of the relationship between the resistance and the Judenrat. What the Judenrat did to weaken the resistance was done to prevent uprisings. We were a bit afraid to do anything, responsibility for which could afterwards fall upon us. We hesitated a bit. We were partly convinced, not because we thought that the Judenrat acted in our interests or for the good of the people. It may be that the Judenrat believed that they could save not only their relatives, but also a small portion of the people. We did not believe that". "The men of the resistance had one aim: revolt, the spilling of German blood, and saving the honour of the people". (p. 21).

Here and there the youth of the resistance engaged in rescue actions of limited proportions, and later there were also attempts at and outbreaks of partisan fighting from the forests and even of local uprisings, of which the most notable was the glorious revolt of the Warsaw ghetto. Against this background, difference of outlook began to increase and sometimes feelings of hatred and resentment were aroused against the Judenraten and the Jewish police. A fertile field was most certainly found also for unjustified hate and for spreading rumours about acts of corruption and protection given to relatives, rumours which in many cases, in light of the conditions of that time, grew out of suspicion and jealousy alone.

After the Holocaust, when the horrible details became known to the Jewish public, and in particular the Israeli public which had luckily not experienced the Holocaust, controversy broke out as to the correct and proper path which the Jewish public and its leadership should have taken in the countries of the Holocaust. The controversy still continues and will apparently never cease. Various opinions, which need not be detailed. were expressed. One can only point out that that it was even argued (though the argument has not gained currency) that the Jewish leadership and the Jewish organisations in the

countries involved had themselves caused the shocking dimensions of the Holocaust, since, if not for them, the Germans would have been unable to carry out extermination on the scale that they did, and thus they bear the responsibility.

Every one may, of course, take a stand on this matter according to his own thinking and emotions. Opinion may be reached from the viewpoint of national honour, the Judenrat and the Jewish police may be criticized, even the intention to save Jews may be regarded as not justifying any cooperation with the Nazis or any act from which the Nazis could derive benefit (and we have already noted that the very existence of these institutions was a form of cooperation, albeit unintended). The same person can strongly advocate that the nation should have preferred mass suicide rather than be led as lambs to the slaughter, a phenomenon which is not so rare in Jewish history. By a negative view of the activity of these institutions, a person can proclaim the idea that instead of being diverted by the hope of saving Jews through forced labour for the benefit of the Germans, by giving bribes, by following orders in return for promises and other such things, mass revolts in all the countries of the Holocaust should have been organised, even without arms, for there were none, and the principle of self sacrifice should have been preached, even if to no avail, in struggle and war, as was done in various places by resistance groups on a scale that did not reach the proportions of the revolt of the Warsaw ghetto.

The view is possible that even in the various places where the calculations and the manouverings of the Judenrat were to a certain degree or during a certain period, justified, it would have been better had this body not existed at all.

There are those who uphold the idea that beyond the practical situation stands the principle, the rule of Jewish law, the tradition, that one may not cause the loss of a single soul in Israel even for the purpose of thereby saving many Jews, and from this perspective the activities of the Judenrat and the Jewish police are to be decried, even had they succeeded in saving many people by cooperation resulting in the number of victims sent to destruction being reduced. For such people it is perhaps impossible to speak of a good Judenrat or a bad Judenrat since the very existence of this institution, together with the Jewish police force, the medium for delivering Nazi orders, should be considered as invalid, and these institutions, or their memory, are to be held up to calumny.

On the other hand there are those who believe that one cannot ignore the reality of those pitiful days, when the frightfully tragic situation is contemplated in which the leaders of Jewry found themselves in those places. They had to carry the awesome burden and, by calculation and manoeuvre and hope, to soften the harsh orders. To save or to delay the acts of extermination they were forced to become the obedient servants of the Nazis and appear as cruel, and perhaps even as traitors, in the eyes of the suffering masses when they or their families were being carried off to the camps. And all this despite the fact that afterwards most of the leaders of the Judenrat and the members of the police were also exterminated.

In any event, even the most extreme of the critics have not charged that the Judenrat or the Jewish police *took upon themselves the aim* of assisting the Nazis in the extermination of Jews.

It is clear that the question which of the positions outlined above is correct, that is to say, which line should the leader have followed, is one for history and not for a court before which a persecuted person is brought to face criminal charges under the Law in issue here, so long as the legislator has not directed the court in the Law itself that it must take up a position, which it must be, as regards the line championed by the holders of the above-mentioned views.

The court then is given the task of judging the actual concrete acts attributed to the accused in light of the provisions of the Law, in accordance with all the rules which apply in a criminal trial, and no more. From this viewpoint, it is very likely that some of those which hold the above-mentioned views would not be satisfied with the wording of section 10 of the Law and would unintentionally find therein that which is not there. It is clear from the language of section 10 that the legislator chose not to take any stand on the above-mentioned, and, if at all, the wording would appear to lead in a direction which does not support the interpretation adopted by the learned judges below.

Section 10 says, "If he did ... the act with intent to avert consequences more serious than those which resulted from the act or omission", he is to be released from criminal responsibility. Every court must discover the intention of the legislator from the words used in the Law, in their simple and ordinary meaning. If for example, the Nazis had

presented an ultimatum to the Judenrat to supply them with one thousand forced labourers for their factories, by threatening that if the demand were not met, they would expel tens of thousands of Jews immediately and send them to be exterminated, and the Judenrat, with the intention of averting such immediate extermination carried out the order with the assistance of the Jewish police, the question arises, is the Judenrat or the Jewish police, guilty or innocent under the said Law.

Let us take another example. In the literature of the Holocaust the story is told of the ghetto in one city, in which a Gestapo man was killed by a member of the Jewish underground. The Nazis surrounded the ghetto and issued an ultimatum that if the member of the underground was not delivered up to them alive within a certain time, they would hang hundreds of hostages. The man, on his own initiative in an act of self- sacrifice, gave himself up and the threat was not carried out.The terrible question which arises is what would have been the position under the Law, if the underground man had not surrendered and the Judenrat, through the police, had handed him over, so as to prevent the hanging of hundreds of victims? It is true that one recoils from the very idea of handing the man over. It is also true that if there were such cases of handing over at all, they were extremely rare. But this is not determinative for a court which must judge according to the Law. While it grates on the ear to hear this, and even more hurts to say it, particularly after the Holocaust, the answer is that according to the terms of the Law, the accused could rely on the defence provided by section 10(b).

The lower court's judgment makes an effort to limit the application of the defence under section 10, but with no justification which can be found in the language of the section. The learned judges even found need to cite the words of one of the speakers in the Knesset during the debate on the Law, words from which one need not necessarily, in my opinion, draw the conclusion reached by the learned judges.

The rule is well-known that observations during debates in the legislature are not authoritative for determining the intention of the legislator. This rule is immensely more correct when a court is dealing with *criminal law* which requires a strict interpretation in light of the rule that where two different interpretations are possible, one should adopt that which is best for the accused, and particularly in this case where the language of the section is not at all ambiguous. This does not mean that all the acts committed by all the

Judenraten are to be considered as pure and worthy of the defence of section 10(b). One must judge the acts of each accused, and the question regarding the defence of "more serious consequences" is a question of fact, to be solved in the light of the circumstances of time and place of the occurrence of the event which is the subject matter of the charge. But it is impossible to say that the consequences which the accused intended to avert *are in fact "more serious"* but not those which the legislator intended. On what legal principle would such a statement be based? In a criminal trial, when the wording used is clear and fits in with the defence of the accused, it is impossible to ascribe a presumed intention or an "implied" intention to the legislator and to base a conviction on it.

In this connection, it is worth citing the end of section 10, "however, these provisions shall not apply to an act or omission constituting an offence under section 1 or 2(f). Section 1 is concerned with the destruction of the Jewish people etc., whilst section 2(f) speaks of murder. That must mean that all other acts or omissions which constitute offences under other sections of the Law, such as section 2(e) - manslaughter, section 5 - delivering up of a persecuted person to an enemy administration etc., the defence of section 10 is available to the accused.

It is correct to note that the application of section 10(a) could not arise at all in this trial and was not in fact raised by the defence. But what one may also learn from this is that the interpretation given in the judgment to the intention of the legislator in section 10 is fundamentally flawed.

Section 10(a) provides: "If he did ... the act in order to save himself from the danger of immediate death threatening him", the court is to release him from criminal responsibility. Let us assume for example, that the persecuted person is accused of a felony under section 5, delivering up persecuted persons to the enemy administration, and the court is convinced that he did this in order to save himself from the danger of immediate death (pointing a gun at his temple so that he reveals the hiding place of persecuted persons) and that he did his best to avert the consequences of his act. Despite moral considerations, the defence afforded by section 10 would be available to the accused, even if the persecuted people were later exterminated, since the section speaks of "doing his best", in other words, to the extent he was able so to do.

This is also the place to note that the learned judges. expanded by interpretation the applicability of section 5 just as they limited by their interpretation the scope of section 10. I also believe that keeping order and giving a direction to prevent movement from group to group was not "being instrumental in delivering up" as explained by my learned friend Cohn.J., *and therefore the appellant need not rely on section 10 at all*. I do not therefore have to deal with the argument of Mr. Kwart regarding the mode and amount of proof in the matter of "the intention to avert more serious consequences", and I will only say that I do not place much value on the fact that only on re-examination did the appellant raise his story about the fear of the Nazis opening fire if order was not kept, just as I do not attach importance to the fact, noted in the judgment, that when the appellant testified as to what induced him to join the police, he first mentioned the benefit of a more comfortable life before mentioning the desire to help Jews. In this connection I would add that, with the greatest respect, I cannot accept the reasoning at the beginning of paragraph seven in the judgment, that it is impossible to release the appellant under section 10(b) because he had reasons for not resigning from the police and "because the intentions of the accused, when he persisted in his position of command ... and took upon himself the task of keeping order ... although he knew after the Ulkush incident that the object of the concentration was 'selection'... and carried out guard duties by preventing movement from group to group, were not to avert more serious consequences but were selfish."

The Jewish police was not declared to be an enemy organisation. The appellant was also brought to trial in Poland and did not deny that he had been commander of the police, and he was acquitted. To have been a policeman in the Jewish police is not an offence under the Law in question. Section 10(b) speaks of committing an act against the Law, in order to avert more serious consequences. Consequently, "the averting of more serious consequences" cannot be placed against the appellant's having been the commander of the police, or against his persistence in that position. The appellant joined the police back in 1941. He did not join the police for the purpose of the selection of 12 August 1942. and *did not persist in his position in order to keep order that day.* The keeping of order. and the giving of the command preventing movement from group to group. is only to be tested by whether, according to the prosecution's view. it constituted "instrumentality in delivering up". That, therefore, is the act which is an offence under the Law and which the defence sought to show committed in order to prevent more serious consequences; though an attempt was made by the prosecution, apparently under the influence of the initiators of the

trial, to charge the appellant with membership in an enemy organisation, namely the Jewish police.

As I have said, only the acts which are the subject of the charge are to be judged, unconnected with the question of which of the different opinions regarding the policy of the Judenraten, outlined above, is correct. From this viewpoint, it appears to me that the prosecution went too far in calling witnesses who testified generally against the Judenrat and the police, witnesses whose evidence was more in the nature of an expression of their opinions and views of the Judenrat and the police as institutions than evidence against the appellant. That is shown by the fact that despite the large number of witnesses, the conviction on counts one and six is based on one witness (Fishel). On the second count, which is very general, the conviction, for keeping order on the "HaKoah" ground and for the direction not to permit movement from group to group, is based on the testimony of the appellant himself, testimony which was transformed in contemplation of the court into an admission, "and no sufficient evidence was found on the other facts alleged in the particulars of the offence in the indictment, namely that he, with others, saw to transporting thousands of Jews to the places of concentration and guarding them so that they should not escape, and then transporting approximately 5000 Jews, including the elderly, women and infants, to the death camps, under guard" (paragraph 11 of the judgment, first part). The conviction on the eleventh count is also based on the testimony of the appellant alone. The conviction on the seventh count (the case of assault) is based on one witness, Arieh Lior, whom the court believed.

As regards this last mentioned witness the judgment points out that "In his estimations and conclusions he took an extremely negative, uncompromising attitude about the line of the Judenrat and those who served it". And as regards the prosecution witnesses, the judgment says "That the hearts of virtually all the prosecution witnesses are filled with feelings of resentment towards the Judenrat and the Jewish police in Bendin and towards the accused as the commander of that police force."

In spite of all this Mr. Kwart was unable not to point out to us that the Judenrat was not and is not accused here. But it apparently slipped Mr. Kwart's mind that the prosecution charged the appellant in count 12 with no less than "membership in an enemy organisation" under section 3(a) of the Law, and that enemy organisation was the Judenrat

and the police, since the indictment says that the appellant was a member of the Jewish militia and from the time of his appointment to commander held a position in an enemy organisation "on behalf of the *Judenrat and the administration one of whose aims was to assist in carrying out the activities* of an enemy administration against persecuted persons".

For all the criticisms levelled against the methods of the Judenrat, or the Jewish police, I have yet to hear the opinion that their existence resulted "from the aim" they set themselves of "assisting in the carrying out of the activities of an enemy administration against persecuted persons". In the course of the trial the prosecution withdrew this charge, but in the meantime it had brought witnesses who testified against the Judenrat and the police generally, even without testifying against the accused. The learned judges stress that they did not ignore the position of the prosecution witnesses, but found them to be honest people speaking the truth. But, with respect, when a purposive atmosphere is created in a trial of this kind, with its historical background and divided opinions, then even if the witnesses give the impression of being truthful, there is room to *fear* that although these are people who believe in the honesty of their testimony, they insensibly allow their imagination to override their memory. It is therefore more assuring for every act, the subject of the charge, to be proved by something more than one witness. The purposive atmosphere is therefore another circumstance for justifying the demand for more than one witness.

Incidentally, from the passage in the sentence cited above one gets the impression that even the learned judges took a position concerning the line of the Judenrat, in saying that the appellant "was led by people who were known in the Jewish community as communal workers and spokesmen even before the war, and it was difficult for him to take an independent line and make *moral judgments against that leadership"*.

As regards counts 6, 7 and 11 I agree with the remarks of Cohn J., but I wish to add regarding counts 6 and 7, which are based on section 4 of the Law, that it appears to me that one cannot ignore in the definition of "place of confinement", the words "any place in an enemy country which... was assigned". This means, it would appear to me, a place assigned in advance, such as a concentration camp or perhaps also any place within the ghetto walls, but not just a place that the enemy administration happened to make use of. There was no proof that the orphanage, which was outside the place of concentration of the

Jews or the area near it, *was a place "assigned"* by order of an enemy administration, albeit the enemy made use of it from time to time. In any event I also believe that but for counts 1 and 2, on which the appellant was convicted, the prosecution would not have brought him to trial on the three counts detailed above.

To sum up, even if no one of the circumstances mentioned above as justifying the requirement not to be satisfied with one witness is sufficient, the combination of circumstances mentioned above, along with those pointed out by Cohn J. do provide such justification. This is particularly so with regard to the first count, the matter of the children. As regards this count, if, in light of the afore-mentioned circumstances, the conviction of the appellant on the basis of the testimony of Fishel alone could appear to be unjust (and so it appears to me) he should be acquitted, even if the testimony of Fishel points in the opposite direction.

Finally, 1 wish to join my friends in their praise of the judgment given by the District Court, for its stucture, its mention of each thing according to the page reference in the lengthy record, which helped us very much, and for the great effort expended upon it.

LANDAU J. I concur in the acquittal of the appellant for the reasons already explained by my worthy colleagues and for other reasons which I shall explain. Before doing so, I wish to join my friends in their words of praise for the judgment of the District Court, written by Judge Erlich. The detailed work done by the judges in analysing the evidence and their sincere efforts to probe, by exceptionally balanced and clear craftsmanship, the depths of the legal and human problems that faced them in this difficult case are all evident in the judgment. If we disagree with them. after further clarification based on the foundations laid by them, is not to detract from the respect we feel for their work.

All are of the opinion that it is not for the court to decide the great and spreading debate, not a little influenced by prophetic hindsight, over the path followed by the Judenraten wherever they were cooperating to one or another degree with the Germans they went beyond moral principle and whether the benefit of their activities and their very existence was greater than the damage they caused. Olshan P. has already spoken of this and I can only agree with his observations. That cooperation, borne of unprecedented

duress and force, was not as such declared to be a criminal offence by our legislator. For this reason, the prosecution committed a mistake in dealing with this particularly sensitive issue when it added to the indictment a charge which sought to declare the Jewish militia in Bendin an "enemy organisation". This gave the entire prosecution case a mistaken direction from the beginning. The note of triumph with which counsel for the prosecution told the court at the opening of the trial that he had a great deal of evidence which allowed him to add this count to the indictment turned into a note of defeat at the end of the prosecution case, when he admitted that the evidence brought by him was not sufficient to prove this count and therefore requested that the accused be acquitted on it. Nevertheless, echoes of this sweeping charge can be found in the judgment as well, where the learned judges considered the question, whether the appellant should have resigned from his position in the Jewish militia ("the Jewish order service"), to avoid the need to commit acts which they deemed criminal. In connection with this, they describe the appellant as a "little man", in the words of one of the witnesses, and in a passage which, in my opinion, goes to the root of the problem, they add:

> This is in fact the amazing thing which characterised that period, that in the atmosphere of extraordinary pressure of those days, moral concepts and values changed, and little men, educated and likeable like these, did not refuse the life jacket, even if it necessarily involved assisting in the delivery up of their Jewish brothers to the Nazi murderers.

Later on they say:

> In light of the mammoth dimensions of the Holocaust, in which one third of our people was exterminated by the Nazi enemy, and major centres of our national existence were totally destroyed, the Israel legislator, in 1950, speaking in the name of the nation, did not wish to forgive those small and likeable men who sinned against the nation for selfish reasons during that abnormal period.

These are indeed piercing words that come from a grieving heart, but it seems to me, with all feelings of respect, that they are lacking in strict law. Obviously, if the appellant

committed the criminal offence of rendering assistance in the delivery up of persecuted persons to an enemy administration, as defined in section 5 of the Law, he must account for that. On this question my friends have already spoken, and I will also have something to add below. And it is also the bitter truth that "in the atmosphere of extraordinary pressure of those days moral concepts and values changed". But it would be hypocritical and prideful on our part - on the part of those who never stood in their place, and on the part of those who succeeded in escaping from there, like the prosecution witnesses - to make this truth a cause for criticising those "little men" who did not rise to the heights of moral supremacy, when mercilessly oppressed by a regime whose first aim was to remove the image of man from off their faces. And we are not permitted to interpret the elements of the special offences, defined in the Nazi and Nazi Collaborators (Punishment) Law, 1950, by some standard of moral conduct which only few are capable of reaching. One cannot impute to the legislator an intention to demand a level of conduct that the community cannot sustain, especially as we are dealing with ex post facto laws. Nor should we deceive ourselves in thinking that the oppressive weight of the terrible blow which our nation suffered will be lifted were the acts committed there by our persecuted brethren to be judged according to the standard of pure morality.

For similar reasons I cannot accept the negative tone with which the judges pointed out the selfish motives which led the appellant to join the Jewish militia and continue to serve in it. Men take care of themselves and their families, and the prohibitions of the criminal law, including the Nazi and Nazi Collaborators (Punishment) Law, were not written for the exceptional heroes but for ordinary mortals with all their weaknesses. The existence of selfish motives does not yet negate the possibility that, in dealing with some act committed by the appellant such as his activity on the day of the "selection", 12 August 1942, he may rely on the defence of section 10(b) of the Law, that he acted in order to avert more serious consequences and actually averted them.

It also appears to me that the learned judges were a little too severe with the appellant in dividing the matter of his relations with the youth groups into two stages and deciding that only in the second stage, during the period of the final liquidation which began in 1943 after the death of Munik Marin, the chairman of the Judenraten in the Zaglambia region, was any link forged between the appellant and the organised youth, in delivering information and in rescue action, because the appellant then already knew that in any event

he had nothing to lose. First, the court itself noted that the organised youth had difficulty in finding the proper course to pursue and up to a certain point, beginning in the middle of 1942, was mainly occupied in making plans for the future. Secondly, at least one witness who favourably impressed the court, Aharon Gefner, testified to an act of rescue by the appellant which had occurred as early as November 1942, when he released from German hands a group of twenty members of the Gordonia movement, including the witness himself. (p. 336). Kelman Balhash, an underground member, also testified to receiving information from the appellant at the end of 1942 and the beginning of 1943, before the death of Marin. It is self-evident that by activity such as this the appellant placed himself in danger.

I will now confine myself to the second count, the "selection" of 12 August 1942. In interpreting the offence of instrumentality in delivering up persecuted persons to an enemy administration, under section 5 of the Law, we would not be mistaken if we interpreted this section in association with the section 6, concerning the blackmailing of persecuted persons. Section 6 speaks of receiving a benefit from a persecuted person under threat of delivering up him or another person to an enemy administration, or from a person who had given shelter to a persecuted person under threat of delivering up him or another persecuted person to an enemy administration. These are typical cases of delivering up a persecuted person to an enemy administration, namely the delivering up of a person hiding from the enemy administration or giving shelter to such a person. The legislator had in mind treasonous cases of handing over such persecuted people or informing on them, leading to their capture by an enemy administration. Now, the District Court declares that "one who tried in those days to prevent a persecuted person from escaping from the group destined for expulsion was thereby instrumental in delivering up the person to an enemy administration". My worthy friend, Cohn J., has already explained why this wide interpretation is not supported by the language of the section, and I agree with him completely. There is no justification for departing in this section from the rules of strict interpretation customary in criminal offences. If we interpret the section according to its terms, as we must, one clearly cannot speak of the delivering up into German hands of the thousands of Jews who gathered together in the ground, because of the actions of the Jewish police under the command of the appellant, whether by generally maintaining order or by preventing the movement of individuals from the group destined for death to one of the other groups. All of those gathered were in any case "delivered up" from the start into

the hands of the Germans, who surrounded the ground with guards armed with machine guns, keeping a close eye on all that was being done in the ground by the Jews undergoing selection and by the Jewish guards. Regarding the total life and death control the Germans had over these imprisoned Jews, the fate intended for one group or another is immaterial. He whose fate was temporarily decided on the side of life, by being placed into the groups not destined for Auschwitz, continued to be in German hands, at least until the evening of that day, when the Germans stamped their identity cards with a permit for temporary release, or were sent to do forced labour. In other words, such people were no less "delivered" into the hands of the Germans than those who were to face immediate death at Auschwitz, and one should not mix up at this point the fate of each group after it left the ground. The appellant was not accused of instrumentality in the extermination of the Jews who were sent from there to Auschwitz, and it was impossible so to accuse him, since he did not desire their extermination.

So as to demonstrate the state of things, we asked Mr. Kwart, during the argument before us, who delivered Jews in that ground, whose fate was shipment to Auschwitz, to whom within the meaning of section 5. Mr. Kwart had difficulty answering this question. He pointed out that one should regard the "selection" as a continuing process, but I fail to see how this advances the argument as to the appellant's guilt. He also noted the words in the section which require "instrumentality" as one of the ingredients of the offence, and not the delivery up itself. These words even increase the difficulties of interpreting this section, unless we consider they were added for stylistic effect only and to do so is to counter the assumption that the legislature does not use words pointlessly. One who is instrumental, that is to say, aids in the delivery, is in any case punishable by virtue of section 23 of the Criminal Law Ordinance, if the delivery itself is a criminal offence, and why therefore were these words added? In any event the question we asked reappears in a slightly different form: who was the deliverer of the victims to the enemy administration whom the appellant assisted? I heard no answer to this question.

What has so far been said is sufficient to warrant quashing the conviction under the second count, but I wish to point out other weak points in the conviction on the acts that were proved. Let it not be said that in so doing we are engaging in hair-splitting and pedantry which is not seemly in a matter so tragic. We have no alternative but to analyse the facts exhaustively, so as to discover whether the appellant crossed the border between

acts that were perhaps morally contemptible and conduct which warrants the sanctions of the criminal law, and wherever there is doubt, we must come down on the side of innocence.

The District Court considered that the criminal conduct of the appellant was mainly that he ordered his police to prevent Jews moving from the group to be sent to Auschwitz to one of the other groups. It should be noted here that the attempts to move from group to group were not all in one direction. The third group, the group destined Eor death, contained primarily elderly people and children. Haika Klinger, at page 77 in her book, tells how, "The Germans entertained themselves; the children to be sent for expulsion, the parents for release, or vice versa; the children ran after their parents, the mothers after their children. They separated them by force, with clubs and rifle butts."

Another example is Eound in the book by Jochanan Rantz, written in English and submitted by the prosecution. At page 52 we find a diagram made by the author of what occurred that day in the "HaKoach" ground in which he shows the location of the groups after the "selection". The third group is designated by the words, "For death in Auschwitz" and around... it is written "Guarded by SS guards", while around the first group which was to be released is written "Militia (meaning the Jewish order Service) and SS guards". Around the second ("to work camps") is written simply "Guards". The learned judges did not put their minds to this and Mr. Kwart could not explain the matter. I found a further hint in the testimony that perhaps the Germans did not want to assign guard duty over the third group to the Jewish policemen. The witness Lipa Kleinman told of the last big selection, in the summer of 1943, in which he succeeded in escaping from the group which was stood up against a wall, to another group destined for forced labour. There as well there were Jewish Police but the witness said, at page 150, "The Jewish police did not guard my group at the wall. There the Germans kept guard."

The District Court apparently assumed that all members of the third group were transferred from the ground to points of concentration, such as the orphanage, and were from there all sent to Auschwitz. But it was not so, for there were those who managed to leave the field that same night though a hole in the fence, with the help of the Jewish police, and many were rescued from the points of concentration by members of the underground, before their being transported. In this way five thousand people of the third

group, almost half of the entire group, were saved (see David Li'or's book at page 75). Thus, even if we judge the action of the appellant on that day by its consequences barring the rescue of those in the third group, to use the expression of the District Court (and in my opinion this is not the correct approach) - it is not at all clear that in the end the position of those in the second group who were sent to forced labour was better than the lot of any particular person in the third group whose attempts to escape while in the ground were foiled by the appellant's police but who was afterwards saved before being transported to Auschwitz.

The District Court felt that the appellant should have resigned from his position as deputy commander of the Jewish police and thus avoid the need to participate in the selection of 12 August 1942. But here as well, one must look at the matter in the reality of the then situation, in so far as we can do so. After having agreed that the mere fact of membership in the Jewish police was not a criminal offence, the appellant cannot be faced with the legal argument that he should have resigned fom his position in order to avoid carrying out the task of generally keeping order. It was also totally unrealistic to demand his resignation on the spot at the time of the selection. when it became clear to him that he was also required to carry out the specific task of preventing the escape of Jews from death. Had he attempted such an open act of revolt before the Germans' very eyes his fate would have been very bitter. perhaps immediate death. We need no evidence to show that the blood of every Jew was worthless in the eyes of the Germans, and the atmosphere of terror which reigned in the ground may be shown by the fact that Mrs. Cherna, the wife of Marin, was so badly beaten by the Germans that she had to be removed on a stretcher.

The learned judges, however, held that the appellant knew beforehand that the purpose of gathering together all the Jews of the city was to send some of them to extermination, and that he also knew of the tasks assigned to the Jewish police at the time of the selection since he had some time earlier participated in another selection in the city of Ulkush in the vicinity of Bendin and was aware that some of the Jews of Ulkush had been despatched to Auschwitz. But one must again be exact in reading the evidence.

The appellant, whose testimony in cross-examination was relied upon by the judges in this matter, said, at p. 204:

> Some of the Jews of Ulkush were sent off, and upon my return to Bendin I knew that they were sent to death, and so when the concentration on the sports ground in Bendin occurred I feared that people were already being sent to death, as a result of such concentrations. It was already known, or really feared.

In other words, he had a bad feeling but no actual knowledge. And there is something in what he said, because during the time between the action in Ulkush and the concentration of Jews in Bendin the Germans engaged in an act of calculated deception, by concentrating Jews of another town in the same area and in the end sending them all home. (See David Li'or's book, at p. 73). This stratagem succeeded in deceiving the members of the Judenrat in Bendin. Arieh Li'or testifies to this, at p. 44:

> When I asked one of the members of the Judenrat, in the ground itself, why we were being gathered together, he answered "They have" deceived us. The head of the Judenrat in Bendin also said that he did not know. I am certain that the members of the Judenrat in Bendin did not know then that the gathering was for the purpose of extermination and how things would turn out afterwards.

One cannot suppose that the appellant who was a tool in the service of the Judenrat, had more certain knowledge than the members of the Judenrat themselves. And as to the tasks exercised by the Jewish police in the "selection" in Ulkush the appellant testified. at p. 204:

> "On the day of the gathering in Ulkush I arrived there with a group of policemen, and our job was to help in carrying out the action there, and we helped by keeping order in the ground.... the experience of Ulkush only gave me material with which to consider the matter, but on 12 August 1942 I did not yet know what the Jewish police would have to do on the 'HaKoah' ground."

Mrs. Felicia Rassold, who was the only witness to testify on the Ulkush incident, aside from the appellant, did not add anything to his testimony in this matter. The result then is that there was no evidence before the District Court that the appellant knew in advance that

he would have to perform the specific task of preventing escapes from group to group in the 'HaKoah' ground. This was what the learned judges saw as his primary guilt under section 5 of the law. There is therefore no real basis for the "resignation demand", even if we accept all the other legal and factual assumptions of the District Court.

As regards the first count, the taking of the children from the orphanage, my worthy colleagues have already explained why it was not safe to determine the facts according to the story of the witness Fishel, and I wish to add to what they said. The District Court was deeply impressed by the testimony of Fishel, and we must respect this impression. However, it is well known that a witness may be convinced, or may convince himself, that he honestly did see things, without having seen them at all. In particular one may not ignore this possibility in the case of a witness who testifies after a long period of 21 years, after having passed through many horrifying events upon which he has without doubt not ceased to ponder. One cannot quash the fear that with such a witness, "reality and imagination have been intermingled and blended together", to use the words of the judges regarding the witness Waxelman. I see no decisive difference in the fact that Waxelman was then a boy of 10, while Fishel was already an adult. I stress, as did my worthy colleagues, that we are dealing with uncorroborated evidence of an act that appears to be out of character, considering the known nature of the appellant and other aspects. Rantz, in his book, at page 55, talks of the rescue of the orphans from the orphanage, and mentions that the head of the Judenrat, Multchidzki, showed particular kindness to the children of the orphanage.

In regard to the circumstances surrounding the testimony of Fishel in court, about which my friend Cohn J. spoke, I wish to note further that it became clear, from the explanations of Mr. Kwart before us, that the learned judges in the District Court did not know that the existence of Fishel was made known to the District Attorney's office by Arieh Lior, and that he also supplied the office with the address of the witness on 13 November 1962. Later, on 22 March 1963, Mr. Libai invited Fishel to the District Attorney's office and he came and gave his statement. Yet this is how the events were described in the testimony of Mr. Fishel, at page 88:

> About a month before the start of the trial (the trial began on 11 March 1963) I met Arieh Li'or and told him that I must come to the trial... He

> did not come with me to the police or to the District Attorney's office, but only told me that I would find out who to turn to, and in the end I found my way to the District Attorney.

This statement is not believable, both as regards the complete apathy which Arieh Li'or supposedly displayed to Fishel's going to the District Attorney and the failure to mention that Fishel was summoned by the District Attorney. One can only guess what Fishel's aim was in saying these things, but it is quite clear in any event that this witness was prepared to deviate from the facts for one reason or another, and this requires greater care in accepting his testimony as the single foundation upon which to determine facts.

In connection with the witness Waxelman, it appears to me that the judges did not exhaust the full significance of the fact that this witness did not mention at all the affair of the orphanage in his statement to the police. This fact, among others, influenced them in not relying on his testimony, but in my opinion it had importance going beyond this. We must remember that, according to the story of Waxelman, he himself used to spend the day with the children of the orphanage since his mother had died and his father was in a camp for prisoners, and so he himself was caught, with the other children by the group of policemen headed by the appellant and was dragged by them to the stairwell, until he succeeded in getting away from them. Such an experience would certainly have been deeply imprinted in his memory, and it would have been only natural when summoned by the police for him first and foremost to mention this incident, in which he himself almost fell victim, as an example of the appellant's cruelty. In his statement to the police he did not mention this matter at all. His excuse, that the police asked him to give evidence in general terms without details, is no excuse, for in the same statement, he told in detail how the appellant slapped and whipped his brother on the day of the "selection" in the football field. In such circumstances, Waxelman's omission to mention the case of the orphanage in his statement to the police casts doubt not only on his own testimony but on the entire story, even when related by Fishel.

Secondly, there is quite a serious contradiction between the versions of Waxelman and Fishel in describing the event. Whilst according to Fishel and accepted by the District Court, the children were hidden for half a day in the attic for fear of the "action", before the policemen appeared in the building (the taking of the children from their hiding place by

the policemen further aggravates the guilt of the appellant and especially gives it the character of delivering up a persecuted person to an enemy administration), Waxelman testifies at page 100:

> I remember that on one day in the summer of 1942, at noon, in the heat of the day, we were informed by the staff of the orphanage that the militia, that is to say, the Jewish police, had surrounded the building and was about to break in and take us to extermination camps. We began to scatter and there was chaos. *Some went up to the roof* and others hid under the tables. I hid in the dining hall. After a short time, the accused, with the policemen, came in and began to gather, to search and catch the children, and I was among these.

The contradiction is patent. It also gives further room to think that the source of the contradiction is not that the events occurred as described by Fishel or by Waxelman but that they never occurred at all.

As for the conviction of the sixth count (the case of Mrs. Wilder) I agree with the views of my worthy friends that it is unsafe here also to rely on the uncorroborated testimony of Fishel, given after so long a time, about a brief incident of the appellant pushing a woman as he crossed the kitchen of the orphanage. I also agree that that place was not "a place of confinement" as defined in section 4 of the Law. It was not proved that the orphanage was in the area set aside for the Jews to live in, before they were imprisoned in the ghetto in 1943 (see also the testimony of Lipa Kleinman at page 149). However, I tend to agree with the submission of Mr. Kwart that the building itself should be regarded as a place of confinement, since the Germans would from time to time concentrate Jews there before being sent to Auschwitz from the nearby railroad station. But to be exact one must further find that such concentration occurred only in certain rooms in the house, and the kitchen did not serve this purpose (see Rantz's book, page 54-55). For this reason, Fishel claims that he took Mrs. Wilder from the place of concentration and made her go into the kitchen, where he worked, so as to save here.

I agree with Cohn J. in what he says regarding the seventh and eleventh counts (assault on Pikarski and forced labour respectively). In the case of forced labour it is clear, in any

event, it was not the appellant who employed Jews in forced labour, but arrested them for the purpose of their being sent to the labour camps. This cannot be regarded an act of assistance within the meaning of section 23(1)(b) or (c) of the Criminal Law Ordinance, for he had no criminal intention of employing Jews under duress, and did what he did while himself being subject to pressure and duress.

On 1 May 1964 we gave notice of our decision to grant the appeal and acquit the appellant, and these are the reasons which at the time we said would be given separately.

Appeal granted,.

Judgment given on May 22, 1964.